No. 13,439

United States Court of Appeals

For the Ninth Circuit

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

This is an appeal to the United States Court of Appeals for the Ninth Circuit from a final admiralty decree of the United States District Court for the Northern District of California, Southern Division.

JURISDICTION.

The proceeding was begun by a libel *in personam* by the United States against appellant on the admiralty side of the District Court to recover damages for a collision on San Francisco Bay between the government-owned S.S. GOLDEN GATE and appellant's tug, HENRY J. BIDDLE. From a final decree in favor of the libelant, respondent has taken this appeal.

The admiralty jurisdiction of the District Court is founded on Art. III, sec. 2, of the United States Constitution and sec. 1333(1) of Title 28, U. S. Code.

Jurisdiction of this Honorable Court of Appeals exists under the same section of the Constitution and Sections 41, 1291 and 2107 of Title 28, U. S. Code, petition for appeal and allowance thereof (Apostles, p. 27) having been duly filed within ninety days from entry of final decree in the District Court (Apostles, p. 26).

STATEMENT OF THE CASE.

The case involves a single question as to the proper measure of damages to be applied to the particular facts here concerned. The amount at stake is not large, but the legal issue presented is of considerable importance, since the Government has numerous other collision claims pending in which the same issue is involved, some of those claims being against this appellant. The case was tried on an agreed statement of facts, and there are no factual issues or conflicts of testimony to be resolved.

As shown by the record, the facts are as follows:

On July 12, 1945, in San Francisco Bay, the S.S. GOLDEN GATE, owned by the United States, was struck by appellant's tug HENRY J. BIDDLE, due to the sole fault of the latter. Appellant was thus liable in full for all legally provable damages sustained by the Government, subject to limitation of liability to the then value of the tug, $1,500. These facts were stipulated to (Apostles, p. 15) and were so found by the District Court (Apostles, p. 21).

After the collision, temporary repairs were made to the GOLDEN GATE at a cost of $250. Surveyors who examined the damage estimated the cost of permanent repairs at $5,400, which is conceded to be a reasonable figure, but the Government never caused such repairs to be made.

On September 5, 1946, pursuant to the War Surplus statute and regulations thereunder, the GOLDEN GATE was sold to the Chilean Line, with collision damage still unrepaired, for the fixed statutory price. No reduction in that price was requested or allowed because of the existing damage.

On that state of facts, the United States contended that its damages were $5,650, consisting of $250 spent for temporary repairs and $5,400 estimated (but never spent) as the cost of permanent repairs. Appellant (respondent below) contended that the Government's recoverable damage consisted solely of the $250 spent for temporary repairs, since the price eventually received for the GOLDEN GATE was a fixed price which was not reduced by reason of the unrepaired damage, and which was the same price at which the ship would have been sold had there been no damage whatever.

The District Court ruled with the United States, holding that the libelant could recover the estimated cost of repair, and that provable damages therefore came to $5,650. Decree was accordingly entered against appellant for $1,500, the full amount of the value of the offending tug (limitation having been conceded by libelant).

ISSUES INVOLVED.

Thus the sole issue here presented is the propriety of allowing recovery for the estimated cost of repairs which were never made, in view of the War Surplus legislation and the sale of the GOLDEN GATE thereunder for the full statutory price. All of the assignments of error relate to that one issue.

SPECIFICATIONS OF ERROR.

First: The District Court erred in concluding that the Act of March 8, 1946 (50 U.S.C.A., appendix, 1736) and the sale of the GOLDEN GATE thereunder had no bearing on the issue of damages. Assignments of Error numbered 5 and 6 (Apostles, p. 29).

Second: The District Court erred in finding and concluding that the libelant could recover for unrepaired collision damage to the GOLDEN GATE despite her subsequent sale for the full statutory price, the same price at which she could and would have been sold had there been no collision. Assignments of Error 1, 3, 4, 7 and 9 (Apostles, pp. 28-29).

Third: The District Court erred in failing to restrict libelant's recovery to the $250 actually expended as a result of this collision. Assignments of Error 2, 8 and 10 (Apostles, pp. 28-30).

ARGUMENT.

FIRST SPECIFICATION OF ERROR.

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE ACT OF MARCH 8, 1946 (50 U.S.C.A., APPENDIX, 1736) AND THE SALE OF THE GOLDEN GATE THEREUNDER HAD NO BEARING ON THE ISSUE OF DAMAGES.

Assignments of Error.

5. The District Court erred in concluding that the sale of the GOLDEN GATE after the collision had no bearing on the issue as to the amount of recoverable damage herein.

6. The District Court erred in concluding that the Act of March 8, 1946 (50 U.S.C.A., appendix, 1736) and regulations adopted thereunder had no bearing on the issue as to the amount of libelant's recoverable damages.

On March 8, 1946 (subsequent to the collision, but prior to sale of the GOLDEN GATE) there became effective a statute providing for sale of war surplus vessels owned by the United States.

That statute, 50 U.S.C.A. (appendix) 1736(d), provides that the sales price for surplus dry-cargo ships shall be 50% of *prewar* cost, less 5% per year for depreciation, but never to be less than 35% of *war* cost.

Subsection (c) of that same section states that "prewar cost" means an amount determined by the Maritime Commission and published in the Federal Register as the amount for which a ship could have been built at the start of 1941.

Subsection (e) provides that "war cost" means the 1944 cost, as similarly determined and published by the Commission.

The GOLDEN GATE was a "C-2" type vessel, built in 1943. (Paragraph VIII of Stipulation of Facts, Apostles, p. 17; Finding VIII, Apostles, p. 24). The prewar and war costs of C-2 vessels were determined and published by the Maritime Commission as provided in the statute, and are found in Title 46 C.F.R., Chapter II, Section 299.56 (subparagraphs (c) (4) and (5)). The figures are as follows: Prewar cost is $2,100,000; war cost is $2,736,624. *Unadjusted* statutory sales price is $1,050,000 (50% of prewar cost), and the floor, or minimum, price is $957,818 (35% of war cost).

Since the GOLDEN GATE was built in 1943 (supra) and was sold in 1946 (Finding VII, Apostles, p. 23), the statutory formula would be $1,050,000 (50% of prewar cost) less 15% (5% depreciation per year), or an "adjusted" price of $892,500. The "floor" of 35% of war cost, however, is $957,818, which thus became *the one and only price* at which the GOLDEN GATE could be sold. In fact she *was* sold for this price on September 5, 1946. (Finding VII, Apostles, p. 23).

It will be seen that, under the Act and the regulations thereunder, all C-2 vessels built in 1943 could only be sold for the fixed amount of $957,818, regardless of their condition. The GOLDEN GATE brought this full price, and would have brought no more if the collision damage had been completely repaired, *or if there had been no collision at all.*

On the basis of this sale for the full statutory price, appellant contended below, and contends here, that the United States suffered no actual damage or loss other than the $250 spent for temporary repairs. Among other contentions, the Government argued that this sale was immaterial and inapplicable here, because it was "res inter alios acta". The trial court agreed with this view in its memorandum opinion (Apostles, pp. 18-21).

We do not quite understand how the sale of the GOLDEN GATE can be thought to fall within the rule cited in the District Court's opinion. As we have always understood it, the rule of reparation from a collateral source set forth in the cited section of the Restatement of Torts (sec. 920, comment "e") relates solely to compensation received by the injured party from insurance, gifts, or contractual arrangements *previously made* (e.g., a contract of employment under which wages continue during disability).

A *sale* of the damaged property has never been thought to fall within this rule. On the contrary, *a sale is frequently used to measure recoverable damages by crediting proceeds against sound value in order to arrive at the amount of loss.* Money received on a sale of damaged property is not insurance or "reparation," or a gift from a third party. It mitigates what might otherwise be a total loss. If a sale to a third party is irrelevant, then in every case of a salvage sale of damaged goods the claimant would be entitled to keep the proceeds and sue for a total loss, since there would be no credit against sound value. Such is not the law.

In *The Marie Palmer,* 173 Fed. 569 (E.D. Pa.), a ship injured by collision was valued by appraisers as worth $8,000 before and $3,000 after the collision. Eventually she was sold for $4,100, and the court credited the sales proceeds against pre-accident value to arrive at $3,900 as the provable damages, rather than crediting only the estimate of post-collision value.

In *Hubbard v. U. S.,* 92 Ct. Cl. 381, the Government was successful in having a claim against it reduced by crediting the proceeds of sale of the wreck against the cost of raising it.

In *The Dunbritton,* 73 Fed. 352 (2nd Cir.), damage to several kinds of cargo was involved. Shipments of nux vomica and tumeric arrived with oil stains on the packages, and surveyors estimated the amount to be allowed for such damage as depreciating the value. At the trial it developed that the cargo owner had eventually sold these goods for full market price. The court held that, *by reason of the sale and receipt of full market value, the libelant had sustained no loss,* and recovery was denied.

Thus the sale of the damaged vessel in this case is not *per se* incompetent evidence, or irrelevant to the issues, and does not fall within the rule that a tort-feasor cannot claim the benefit of "remuneration from other sources." The effect of the receipt by the United States of the statutory price for the GOLDEN GATE will be argued in the next portion of this brief. At this point we contend merely that the sale was properly put into evidence and must be considered on the merits.

SECOND SPECIFICATION OF ERROR.

THE DISTRICT COURT ERRED IN FINDING AND CONCLUDING THAT THE LIBELANT COULD RECOVER FOR UNREPAIRED COLLISION DAMAGE TO THE GOLDEN GATE DESPITE HER SUBSEQUENT SALE FOR THE FULL STATUTORY PRICE, THE SAME PRICE AT WHICH SHE COULD AND WOULD HAVE BEEN SOLD HAD THERE BEEN NO COLLISION.

Assignments of Error.

1. The District Court erred in finding and concluding that libelant's recoverable damage herein amounted to any sum in excess of the $250 spent for temporary repairs to the GOLDEN GATE.

3. The District Court erred in concluding that libelant could recover for unrepaired collision damage to the GOLDEN GATE, despite her subsequent sale for the full price established by federal statute and regulation.

4. The District Court erred in concluding that libelant could recover for unrepaired collision damage to the GOLDEN GATE despite the fact that she was later sold for exactly the same amount as she could and would have sold for had there been no collision.

7. The District Court erred in concluding that libelant was entitled to recover the sum of $1500 herein.

9. The District Court erred in entering decree against respondent for $1500.

The Government's basic contention was that unrepaired collision damage can normally be recovered on the basis of estimates, and that this general rule should be applied in this case. We concede that in many cases a shipowner has been held entitled to recover for collision damage

even though repairs were not made, the estimates of competent surveyors being used to arrive at the amount to be allowed. It is our contention, however, that the rule is not an arbitrary or universal one, but applies only where, in the particular case, it furnishes the best available method of calculating the shipowner's *actual loss.*

At times, collision damages have been measured by depreciation in value before and after collision, by actual repair costs plus detention damage while laid up for repairs, or by the estimated cost of repairs needed but not performed. None of these rules is fixed or sacred. All are but means adopted to try to make the injured party whole. Each has been applied in cases where it was best adapted for that purpose, but only in those cases.

The *basic* rule is that the tort-feasor should make the injured party whole, and rests on the principle of *restitutio in integrum.*

As the Second Circuit has said in a collision case,

> "The fact that a tort has been committed only calls in play the rule of *restitutio in integrum;* so that, where injured cargo nevertheless brought the full market value, the tort feasor was not called upon to pay damages in respect thereof" (citing *The Dunbritton,* supra)—*The Winfield S. Cahill,* 258 Fed. 318, 321.
>
> "The general principle applicable where the collision is not wilful, is that the owner of the injured vessel is to be recompensed to the amount of his *actual loss;* that is, he shall receive a remuneration which places him in *the situation he would have been in, but for the collision.*" *The Rhode Island,* 20 F. Cas. No. 11,740a (S.D.N.Y.).

See, to the same effect, *The Pocahontas,* 109 F.(2d) 929 (2nd Cir.).

In the case at bar the United States, acting through Congress, elected to sell surplus C-2 vessels for $957,818. Nobody forced the Government to sell—it was the voluntary decision of the United States as a sovereign. Pursuant thereto, sound C-2 vessels were sold for that figure, and the GOLDEN GATE was likewise sold for that figure. This is the same amount for which the GOLDEN GATE could *and would* have been sold had there never been a collision with appellant's tug (Answers of the United States to respondent-appellant's interrogatory No. 11—Apostles, pp. 12 and 14).

In short, the GOLDEN GATE was voluntarily sold by the Government at a fixed price of its own selection, and brought $957,818 into the Treasury. Had appellant's tug never come within 50 miles of her, the GOLDEN GATE would have been sold for that same identical figure, and the same amount of $957,818 would have come into the Treasury. Thus the collision has not cost the Government one cent above the $250 paid out for temporary repairs, and payment of more is *not* required to place the United States in the same position it would have occupied if there had never been a collision.

That a rule for measuring damages ceases to apply when the reason for the rule does not apply has been held in many kinds of situations.

For example, in *Ill. Central Ry. v. Crail,* 281 U.S. 57, 74 L. Ed. 699, 50 S. Ct. 180, a retail coal dealer bought a carload of coal at wholesale, and it arrived with a short-

age. He bought no coal at retail to replace the missing coal, and lost no sales, but simply bought other carloads at wholesale from time to time to keep his stocks up. The lower court applied the usual rule of measuring damages by market value at time and place of delivery, and allowed the plaintiff the retail value of the lost coal.

The Supreme Court reversed this and allowed only the wholesale cost, because that was all the plaintiff lost, and he would be made whole by that allowance. The Supreme Court opinion makes these points: That the basic principle is to grant recovery in an amount sufficient to compensate for actual loss; that value at destination is the usual measure only because, in most cases, it affords a convenient and accurate way of measuring the actual loss; that this rule can and must be discarded when it is not as exact as some other, more accurate, means of measuring the loss.

In *S. P. Ry. v. Gonzalez,* 61 P.(2d) 377, 48 Ariz. 260, 106 A.L.R. 1012, tomatoes arrived damaged. Sound market value was $3.50 per box at time and place of delivery, but the plaintiff had already contracted to sell them for $2.75. Due to the damage, they were sold for $1.25 a box, and plaintiff claimed the difference between this figure and the $3.50 sound value. The Court disallowed this claim and gave the plaintiff only the difference between the $1.25 sales proceeds and the $2.75 which he would have received from his customer if the goods had arrived sound. (Incidentally, this decision also illustrates our first point that a sale to a third person is relevant on damages and is not "reparation from a third party.")

In the District Court, libelant argued that the collision brought about an immediate depreciation in the value of the ship, for which a cause of action vested, and that this cause of action could not be affected by subsequent legislation or a later sale under such legislation. We know of no rule of law which says that events after the tort cannot or should not be considered in fixing compensatory damages.

In this very case, for example, the surveyors who examined the GOLDEN GATE shortly after the collision estimated repair costs at $5,400. Had repairs been actually made six months later for an outlay of only $4,000, obviously the latter figure would be the limit of recovery, and an event occurring after the collision would reduce the recoverable damages.

In *The City of Chester,* 34 Fed. 429 (S.D.N.Y.), that exact situation existed. A vessel was injured by collision in New York harbor, and surveyors estimated what it would cost to repair the collision damage in New York. The owner later took the vessel to another port where repairs were made at a cost less than the estimates. The court limited recovery to the actual cost, saying, "Complete restitution is the extent of the damage recoverable."

Another example of subsequent events affecting the measure of damages is the issue of detention damages for loss of use during lay-up for repairs.

In *Carslogie SS Co. v. Royal Norwegian Government,* 1952 A.M.C. 652 (H. of Lords), a vessel damaged in collision made temporary repairs and sailed for another port for permanent repairs. On that voyage she sustained

heavy weather damage which necessitated a lay-up, and in fact she was under repair for some 50 days, of which ten days were attributable to collision damage. Detention damage was denied *in toto,* because the subsequent heavy weather damage had caused the vessel to cease to be a profit-making machine, and the collision, as such, caused no actual loss of profits.

In this case, once Congress ordered sale of C-2 vessels at a fixed price, the GOLDEN GATE ceased to be a profit-making vessel or to have a "market value," and became simply an asset worth the statutory price to the Government and no more. Any theoretical depreciation in "market value" became irrelevant to the question of *actual loss,* and receipt of the statutory price was all the United States could ever hope or expect to achieve.

In *The Pocahontas,* 109 F.(2d) 929 (2nd Cir.), a ship was damaged in collision. Temporary repairs were made above the water line, and the ship went to England for drydock and examination. On that trip the ship sustained heavy weather damage which required immediate drydocking and repair. While these were being made, the collision repairs were made also, and the libelant claimed detention damage for loss of use of his vessel during the repair period. The Court rejected this claim in an exhaustive discussion of the measure of damages.

The holding of that case was that *restitutio in integrum* is the basic principle, and that detention damages are allowed only when the owner can show an actual loss of use because the collision necessitated an immediate lay-up for repairs. Since the lay-up was required for

repair of heavy weather damage, detention damages were disallowed.

In that case the shipowner argued that the collision necessitated repairs, and that the subsequent heavy weather damage added nothing to the pre-existing necessity. The Second Circuit rejected this argument, because events *after* the collision may demonstrate that during the lay-up the ship would have made no earnings *even if there had been no collision.* The Court referred, by analogy, to wrongful death cases where the surviving dependent's damage is measured by life expectancy, but is reduced if he dies before trial.

Thus, in *Sider v. General Electric,* 238 N.Y. 64, 143 N.E. 792, the widow of a man killed by the defendant's negligence sued for his wrongful death, but died, herself, before trial. The trial court held that her cause of action survived her death, but limited recovery to the damage sustained by her until her death, rather than estimating it on life expectancies. The plaintiff appealed, arguing that the widow's cause of action vested as a fixed property right when her husband was wrongfully killed, and that subsequent events could not affect or diminish that right. The New York Court of Appeals rejected this contention, holding that the cause of action is only to recover actual damage, and that the widow's death fixed the period for which she had been deprived of her husband's support.

Cooper v. Shore Elec. Co., 63 N.J.L. 558, 44 Atl. 633, is a similar holding on the same kind of facts, and is cited and followed in the *Sider* case.

These New York and New Jersey decisions are cited with approval in *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 81 L. Ed. 685, 57 S. Ct. 452. There the mother of a seaman filed suit under the Jones Act for his wrongful death and died, herself, before trial. The Supreme Court held that her cause of action survived, but cited the *Cooper* and *Sider* cases, saying:

> "We think that the mother's death does not abate the suit, but that the administrator may continue it, for the recovery of her loss up to the moment of her death, though not for anything thereafter * * *" (300 U.S. at p. 347, 81 L. Ed. at p. 688.)

In all of those cases a cause of action vested to recover loss of support for the survivor's life expectancy, but subsequent events operated to reduce the amount of damage, since they made the amount capable of more accurate measurement.

Another example of subsequent events eliminating damages otherwise recoverable will be found in *King v. Bangs*, 120 Mass. 514. A mortgagee sued a trespasser for removing fixtures from the mortgaged property. In Massachusetts, as in most states, the mortgagee can recover for such damage to his security, his damages being the value of the things removed. On a showing that the mortgagee had later sold the property under a power of sale in the mortgage for an amount sufficient to satisfy the full debt, the court held that the mortgagee had sustained no actual loss and denied recovery. After pointing out that damages should be commensurate with the injury, the court said:

> "But under this rule *the defendant is constantly permitted to give in evidence the plaintiff's subsequent change of relationship to the property, for the purpose of showing that the damages to which he would otherwise have been entitled have been thereby diminished.*" (120 Mass. at p. 515.)

That a mortgagee who eventually receives full payment of the debt has suffered no actual loss by reason of damage to the mortgaged premises is similarly held in *Sloss-Sheffield v. Wilkes,* 231 Ala. 511, 165 So. 764, 109 A.L.R. 385.

In *The Super-X,* 15 F. Supp. 294 (S.D.N.Y.), a tank barge was damaged in collision and surveyors estimated costs at $850 for gas-freeing and $110 for repair work. There was no need for immediate repairs until leaks from other causes later developed, whereupon the barge was drydocked and gas-freed, and both collision and owner's repairs were made. The Commissioner allowed only the actual cost of working on the collision damage, and disallowed detention damage, towing to drydock, and the cost of gas-freeing.

This was upheld by Judge Patterson, who noted the libelant's reliance on the rule allowing recovery measured by estimates, and held that this rule is not inflexible, saying:

> "The libelant relies on the line of cases allowing as collision damage the estimated cost of repairs where no repairs are actually made or where only temporary repairs are made. *The Elmer A. Keeler,* 194 F. 339 (C.C.A.2); *Pennsylvania R. Co. v. Downer,* 11 F.(2nd) 466 (C.C.A.2) It is claimed that if the

collision damages had never been repaired, the libelant could have recovered the estimated cost of towing and gas freeing as well as estimated detention. But I take it that the rule of estimated cost of repairs in cases where no repairs are actually made is not an inflexible one. Cf. *Brooklyn Eastern Dist. Terminal v. United States,* 287 U.S. 170, 53 S. Ct. 103, 77 L. Ed. 240. What is allowed in cases of no repairs is the depreciation in value. In many instances the measure of depreciation is what it would have cost to make the repairs, on the theory that a prospective purchaser of the vessel would presumably calculate his price by deducting what he would have to spend in the future to repair the vessel. So we have the general rule relied on by the libelant as an analogy. In a case where the collision injuries were as light as here, however, the imaginary reasonable purchaser would not be presumed to subtract incidentals like estimated towage and gas freeing or estimated detention. He would count on working in the repair at some future time when the vessel was being repaired for other and more pressing damage or defect, thus avoiding double loss for the incidental items. The libelant's argument for the 'no repair' cases, while plausible, cannot be accepted." (15 F. Supp. at p. 296.)

In the case at bar there is no need to guess at the possible or probable reaction of a prospective buyer. We know that, in fact, the buyer neither requested nor obtained any reduction in price because of the unrepaired damage, but paid the full price asked by the United States, the same price which would have been received if there had never been a collision at all.

We freely concede that the collision in this case caused a possible diminution in the "market value" of the GOLDEN GATE. If suit had been filed and tried before passage of the Surplus statute, the estimated cost of repairs could perhaps have been used as being, *at that time,* the best available method of measuring that loss in value.

With the passage of the statute, however, the situation was radically changed. We do not contend that the statute fixed "market value" at the disposal price, although in one sense the statute did have that effect (since no buyer would pay more as long as he could get a C-2 ship from the Maritime Commission for $957,818). We do contend that the statute *displaced* market value, which then ceased to be relevant or material as a measure of *actual loss.*

After the passage of the statute on March 8, 1946, all C-2 vessels belonging to the United States had a set price, and that price *was all that the Government expected or intended to receive.* Since that full price was actually received into the treasury, the United States suffered no loss by reason of the collision, and is not entitled to make an extra profit on this vessel over and above what was received for *undamaged* C-2 cargo ships.

In summary, it is our contention that there is no special virtue in any particular standard that has been used in past cases to measure collision damages. The basic rule is that the injured party is entitled only to be made whole, not to make a profit. That method of calculating damages should be used which most fairly and accurately makes

good the actual loss—i.e., *which puts the injured shipowner in the same position as if there had been no collision.*

In many cases the actual repair cost will make the injured party whole, perhaps adding detention damages when justified by the facts. In others, depreciation in value is a better test. Where it is clear that a loss *has* been sustained, and that the shipowner is actually *worse off because of the collision,* estimated repair cost has been used to measure his loss when repairs had not yet been made. In our case, however, the libelant showed no actual loss. On the contrary, the facts show that, aside from the $250 spent for temporary repairs, the Government is *not* worse off, financially, because of this collision.

As a matter of ordinary fairness, we submit that there can be no recovery of estimated repair costs when the United States voluntarily sold a number of vessels for a set price and received that same price for the GOLDEN GATE, *exactly as if there had been no collision at all.*

THIRD SPECIFICATION OF ERROR.

THE DISTRICT COURT ERRED IN FAILING TO RESTRICT LIBELANT'S RECOVERY TO THE $250 ACTUALLY EXPENDED AS A RESULT OF THIS COLLISION.

Assignments of Error.

2. The District Court erred in failing and refusing to find and conclude that libelant's recoverable damage was limited to the $250 actually spent for temporary repairs to the GOLDEN GATE.

8. The District Court erred in failing and refusing to conclude that libelant was entitled to recover $250, only.

10. The District Court erred in failing and refusing to enter decree against respondent for $250, only.

The $250 spent by the United States for temporary repairs to the GOLDEN GATE is an out-of-pocket loss caused by the collision, and is properly allowable herein. With the phantom repair cost eliminated, the $250 expenditure is the *only* allowable item, and a recovery of that amount will make the Government whole by putting it in the same position as if there had never been a collision.

That the decree of the District Court should be modified by reduction to the admitted sum of $250 is

Respectfully submitted,

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Dated, San Francisco, California,
September 3, 1952.